***United States Court of Appeals***

***for the Second Circuit***


# BRIEF FOR APPELLANT

76-1220

To be argued by:
RICHARD G. ROSENBAUM

B/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-versus-

RAYMUNDA CRUZ,

Appellant.

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On Appeal from the United States District
Court for the Southern District of New York

# BRIEF FOR APPELLANT

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# APPELLANT'S BRIEF

## QUESTION PRESENTED

Was the employment of a handwriting expert pursuant to Court appointment made at the request of an indigent defendant, protected from disclosure by the attorney-client and work product privileges?

## PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Hon. Henry F. Werker) convicting the appellant after trial of eleven counts of obstruction of correspondence (18 U.S.C. 1702) and from the sentence thereon. Said judgment of conviction was duly entered the 4th day of May, 1976 and a Notice of Appeal was duly filed in the Court below on the 13th day of May, 1976.

The appellant was sentenced to three months in a jail or treatment-type institution, and given a suspended sentence of four years nine months on each of the eleven counts.

# TABLE OF CASES

## STATEMENT OF FACTS

In an indictment filed July 22, 1975, the appellant was charged with eleven counts of obstruction of correspondence under Title 18 U.S. Code Section 1702 (A5).* The indictment alleged that between February 11, 1974 and November 4, 1974, on eleven different occasions, the appellant in her capacity as "superintendent" of 60 West 106th Street in Manhattan, accepted mail addressed to three individuals, Maria Conception, Blanca Garcia, and Lydia Mercado. These letters contained welfare checks made out to the order of the addressees and according to the Government, the appellant removed the checks therefrom, endorsed the names of the payees thereon, cashed the checks at a local grocery store, and converted the proceeds.

At the time of the arrest, the appellant furnished handwriting exemplars to the postal authorities whose expert "found" that the endorsements on the welfare checks "matched" appellant's signature.

Thereafter, the appellant who was indigent, applied to the District Court for the appointment of an independent expert selected by defense counsel. The

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*"A" refers to appendix, "T" refers to the minutes of trial.

appointment was granted and the expert chosen by appellant's counsel was one Joseph McNally.*

On March 17, 1976, defense counsel in accordance with McNally's instructions, took handwriting exemplars from the appellant. The specimens were then forwarded to McNally who compared them to the endorsements on the welfare checks, and thereafter conveyed his findings to defendant's attorney.

At the trial, the defense chose not to call McNally as a witness, but did call the appellant to testify in her own behalf. On cross-examination, the appellant was asked, over objection by defense counsel, whether she had ever given handwriting specimens to persons other than the postal authorities (T224, A11). Her answer was "No" (T225, A12).**

When the appellant rested the government advised the Court that it intended to use Joseph McNally in rebuttal (T229, 230, A13, 14), and then over the objections of

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*Appellant's counsel was appointed pursuant to the Criminal Justice Act. The decision to seek an independent handwriting expert was made by defense counsel in order to aid him in the preparation of an intelligent defense.

**The appellant was uneducated, spoke only Spanish and was completely unsophisticated. It is entirely probable that she did not fully comprehend the meaning of the question.

defense counsel, Mr. McNally took the stand and the following testimony was elicited on direct examination by the government:

Q. What is your occupation?

A. I am an examiner of questioned documents. That is more commonly referred to as a handwriting expert.

The Court: Can we have a stipulation on the record as to his qualifications?

Mr. Rosenbaum: (Defense Counsel)
So stipulated.

Q. Do you know Mr. Richard Rosenbaum, the attorney for the defendant in this case?

A. I have only spoken to him on the phone.

Q. Have you ever transacted business with Mr. Rosenbaum in the area of questioned documents?

A. I have.

Q. In connection with that business did you receive from him certain handwriting that was represented to be the handwriting of one Raymunda Cruz?

A. I did.

The government then rested and the Court, out of the presence of the jury entertained defense counsel's motion for a mistrial:

> "Your Honor, with respect to the questions put to Miss Cruz concerning her giving handwriting exemplars in my office. And with respect to the

> testimony elicited from Joseph McNally just now, I move for a mistrial on the grounds that the material introduced was an invasion of the work product rule, was an invasion of attorney-client privilege, and in addition was so highly prejudicial to the defendant as to not give her a chance for a fair trial." (T233-235, A15-17)

That motion was denied (T235, A17).

In his summation, the prosecutor referred to McNally's testimony as follows:

> "Well, Mr. McNally who was called as a government witness on rebuttal testified that he had been retained by Mr. Rosenbaum as a handwriting expert and in fact he had seen certain exemplars of Raymunda Cruz. Isn't it clear that she denied writing those exemplars because she thought that it was going to hurt her case?" (T250, A18)

And in his rebuttal summations stated:

> "However, you know that Mr. McNally, a handwriting expert, was furnished certain exemplars of the defendant's, don't you think that if there was any question about this handwriting [Mr. Rosenbaum: Your Honor, I object. The Court: Overruled.] Mr. McNally would have been there to tell you about it." (T268, A19) [emphasis supplied]

## ARGUMENT

### POINT I

### THE EMPLOYMENT OF AN EXPERT PURSUANT TO COURT APPOINTMENT MADE AT THE REQUEST OF ASSIGNED COUNSEL FOR AN INDIGENT DEFENDANT WAS PRIVILEGED.

The appointment of a handwriting expert by the Court to an indigent defendant, and the employment of that expert by the defendant prior to trial should not have been disclosed to the jury since that information was protected by the "Work Product" and "Attorney-client" privileges. To see how those privileges are applicable to the issue raised on this appeal, it is instructive to review some of the history of the two doctrines.

While an attorney's personal notes and memoranda made in preparation of his client's case are beyond the subpoena power of his adversary, Hickman v. Taylor, 329 U.S. 495, 67 S. Ct. 385 (1947), what material constitutes "work product" is not entirely clear. Early precedents held that the work product doctrine covered only the written personal notes and memoranda accumulated by an attorney in the course of preparing his client's case. See 8 Wigmore on Evidence, Secs. 2317, 2318. Recently, however, the privilege has been extended to cover conversations between defense attorneys and third parties or prospective witnesses. In Re Turkeltoub 256 F. Supp. 683 (S.D.N.Y. 1966); In Re

Grand Jury 473 F 2d 840 (8th Cir. 1973); Matter of Rosenbaum 74 Cr. Misc. 1, Opinion # 41622 (S.D.N.Y. 1974) Original Decision Adhered to 401 F. Supp. 807 (1975); United States v. Mitchell, 372 F. Supp. 1239 (S.D.N.Y. 1973).

Under common law, the attorney-client privilege protected confidences imparted by a client to his lawyer outside the hearing of any third persons. In more recent years, however, it has been held that certain third persons, such as employees of an attorney, interpreters, etc., could be present during the conversation in question without causing a waiver of the privilege, United States v. Kovel, 296 F. 2d 918 (2nd Cir. 1961), and that a prosecutor who eavesdropped or planted operatives in order to listen in on conversations between attorneys and their clients was not a "third party" for purposes of waiver. Coplon v. United States, 191 F. 2d 749 (D.C. Cir. 1951) Cert. denied 342 U.S. 926, 72 S. Ct. 363; Cauldwell v. United States, 205 F. 2d 879 (D.C. Cir. 1953), Cert. denied 349 U.S. 930, 75 S. Ct. 773.

The applicability of the foregoing to the instant case is best expressed in the Turkeltoub case:

> "At the heart of the job of thorough going investigation and preparation is the interviewing of prospective witnesses, hostile as well as friendly, and no lawyer on any side of any case would consider it salutory for a client that the opposition knew who was being interviewed and what was being said during such meetings. If vivid illustration were needed, it is supplied every day in this courthouse by the government's staunch resistance to discovery efforts by

defendants in criminal cases." In Re Turkeltoub, Supra 256 F. Supp. 683 at 685.

Put another way, an attorney engaged in the preparation of his client's defense must be able to conduct a complete and thorough investigation uninhibited by the fear that he will be compelled by the prosecutor to divulge directly or indirectly the fruits of his inquiries. This is the central theme of the work product and attorney-client privileges and the rationale of recent cases extending the purview of those doctrines, In Re Grand Jury 473 F. 2d 840; In Re Turkeltoub 256 F. Supp. 683; Matter of Rosenbaum, Supra.* The retention of an expert (such as the handwriting expert in this case) by the defense attorney is no different from the acquisition of information now covered by the privilege umbrella and should likewise be protected since it is as much a part and parcel of the "attorney's file" as notes, memoranda and oral recollections of conversations with prospective witnesses.

The only Second Circuit case which discusses

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*In Re Grand Jury 473 F. 2d 840 at 842 which contains a fact pattern similar to Turkeltoub stated: "Disclosures now demanded touch a vital center in the administration of Criminal Justice, the lawyer's work in investigating and preparing the defense of a criminal charge. Appraising these interests in the circumstances now presented, the Court concludes that the attorney is not only entitled but probably required to withhold answers to the Grand Jury's question."

in earnest the attorney-client privileges vis a vis third parties is United States v. Kovel, 296 F. 2d 918 (2nd Cir. 1961). In that case an accountant retained by a law firm was subpoenaed to testify before a Grand Jury as to conversations between himself and a client of the firm. The accountant refused, invoking the attorney-client privilege and was sentenced to one year for contempt. The Court of Appeals, in vacating the contempt judgment made it clear that the modern world mandated a more liberalized interpretation of the attorney-client privilege:

> "The complexities of modern existence prevent attorneys from effectively handling clients affairs without the help of others; few lawyers could now practice without the assistance of secretaries, file clerks, telephone operators, messengers, clerks not yet admitted to the bar, and aides of other sorts. The assistance of these agents being indispensible to his work and the communications of the client being often necessarily commuted to them by the attorney or by the client himself, the privilege must include all the persons who act as the attorney's agents." [citations omitted] United States v. Kovel, 296 F. 2d 918 at p. 921

and in a dictum especially germane to the case at hand, the Court implied that the retention of any outside expert is also covered by the attorney-client privilege:

> "The presence of an accountant whether hired by a lawyer or by the client while the client is relating a complicated tax story to the lawyer, ought not destroy the privilege..."

Similarly, should not the "presence" of a handwriting expert

employed by defense counsel also be protected? See also United States v. Jacobs, 322 F. Supp. 1299 (D.C. Calif. 1971).*

While there are apparently no Federal precedents which deal squarely with the fact pattern of the instant case, the Court of Appeals of Michigan comes fairly close. In People v. Hilliker, 29 Mich. App. 543, 185 N.W. 2d 831, an attorney as part of the preparation of the defense of his client who was charged with manslaughter, employed a psychiatrist to examine the defendant concerning the latter's claim of amnesia. During the trial, the prosecutor, over the objection of defense counsel, called the psychiatrist to the witness stand and elicited testimony which was very damaging to the defendant. In reversing the conviction, the Court found that the psychiatrist's examination of the defendant and the conversations between the psychiatrist and the defendant were privileged.

> "Since the privilege [attorney-client] clearly extends to confidential communications made directly by the client to his attorney, there is nothing to indicate a different result where that communication is made to the attorney by an agent on behalf of the client, such as a doctor

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*In that case the Court, citing United States v. Kovel, held that a memo from an attorney to an accountant containing information related to the attorney by his client was protected by the attorney-client privilege.

> or psychiatrist [citations omitted]. In these complex times the attorney-client privilege would be greatly eroded unless the client is allowed to communicate through an expert whose services are needed to prepare for trial. [Emphasis supplied.]
>
> "In the case at bar, Dr. Gordon [the psychiatrist] was defendant's agent for the transmission of confidential facts to his attorney in furtherance of the attorney-client relationship. As such, both the report and testimony of Dr. Gordon were protected from disclosures as preferred communications." People v. Hillaker, Supra 185 N.W. 2d 831 at 833, 834.

In the instant case, the handwriting expert was also the appellant's "agent" for the transmission of confidential facts to his attorney in furtherance of the attorney-client relationship. While this Court is not "bound" by the Michigan precedent, the conclusion reached therein is consistent with the spirit of the Kovel case.

The mere possibility that an expert retained by defense counsel can be brought into Court by the Government and compelled to divulge his findings, can only serve to inhibit the lawyer from seeking data essential to the preparation of his client's defense, thereby depriving the accused of his right to an adequate defense under the Fifth and Sixth Amendments. [See In Re Turkeltoub, Supra at p. 685.] Moreover an unfair burden is placed on the indigent defendant who, unlike the more affluent defendant, must apply to the Court for his expert thereby publicizing the latter's name for all to see, including, of course, the prosecutor.

## CONCLUSION

For the reasons set forth in Point I, the judgment of conviction should be reversed.

Respectfully submitted,

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